Supreme Court, U.S.
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No. 09-

IN THE
Supreme Court of the United States

NEW WEST, L.P. and NEW BLUFF, L.P.,

Petitioners,

v.

CITY OF JOLIET, ILLINOIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When Congress has expressly directed that the Nation's dwindling supply of affordable housing be preserved and expressly delegated to the Department of Housing and Urban Development ("HUD") the power to decide which housing shall be preserved, may a local municipality thereafter simply usurp HUD's authority by exercising its eminent domain powers to destroy that housing?

2. After *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) and *Cuomo v. Clearing House Association, L.L.C.*, 129 S. Ct. 2710 (2009), does conflict preemption exist or is preemption now entirely dependent upon express preemption language in a statute or regulation?

3. Does HUD's first mortgage on an affordable housing development, its right to possession of and control of the property and its status as the beneficiary of regulatory and use agreements between the owner and HUD requiring that the property remain affordable housing, create a protectable federal property interest?

4. May a local municipality seize federal property interests over the objection of the federal government?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the appellate proceeding in the United States Court of Appeals for the Seventh Circuit whose judgment is sought to be reviewed:

A. The Petitioners

New West and New Bluff are Illinois real estate limited partnerships. New West and New Bluff hold title to Evergreen Terrace I and II, respectively, which comprise Evergreen Terrace, the federally subsidized affordable housing development located in Joliet, Illinois that is at the heart of this dispute. New West and New Bluff are defendants in the underlying eminent domain action and were appellants in the Seventh Circuit.

B. The Respondents

1. Plaintiff-Appellee

Respondent City of Joliet is an Illinois municipality. Joliet is the plaintiff in the underlying eminent domain action and was the appellee before the Seventh Circuit.

2. Defendant-Appellant

Respondent United States Department of Housing and Urban Development is a defendant in the underlying eminent domain action and was an appellant before the Seventh Circuit.

3. Intervenor Defendants-Appellants

Respondents Teresa Davis, Helen Dirkans, Oscar Harris, Elvis Foster, Richard Strejc and Brenda Strejc are residents of Evergreen Terrace. They are intervenor defendants in the underlying eminent domain action and were appellants before the Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioners New West and New Bluff are limited partnerships under Illinois law. Neither has a parent corporation. No publicly held company owns stock or shares in the partnerships.

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Petitioners New West and New Bluff respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's decision on Petitioners' interlocutory appeal is reported at *City of Joliet v. New West, L.P.*, 562 F.3d 830 (7th Cir. 2009) and reprinted in Appendix A. The District Court decisions granting Joliet's Motion for Judgment on the Pleadings and denying Petitioners' and HUD's Motions for Summary Judgment are reprinted in Appendices B and C.

JURISDICTION

The District Court and the Seventh Circuit granted Petitioners leave to prosecute an interlocutory appeal from the District Court decisions. On April 9, 2009, the Seventh Circuit entered its judgment affirming the District Court decisions. Petitions for Rehearing and Rehearing *En Banc* were denied on July 14, 2009. App. D. This Court has jurisdiction to review the judgment of the Seventh Circuit on *certiorari* pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Pertinent constitutional and statutory provisions include the Property Clause of the U.S. Constitution, U.S. CONST., art. IV, §3, cl. 2, the

Supremacy Clause of the U.S. Constitution, U.S. CONST., art. VI, cl. 2, the National Housing Act, 12 U.S.C. §§1715*l*, 1716, the Housing and Community Development Amendments of 1978, 12 U.S.C. §1701z-11, and the Multifamily Assisted Housing Reform and Affordability Act, 42 U.S.C. §1437f note. These provisions are set forth in their entirety in Appendices E through K.

INTRODUCTION

The Seventh Circuit essentially has concluded that, absent express preemptive language in statute or regulation, both express Congressional delegation of decisionmaking to HUD and the Supremacy Clause of the United States Constitution may be comfortably ignored. These conclusions, Petitioners believe, are directly at odds with the Constitution and controlling Supreme Court precedent. They ignore the *explicit* Congressional delegation to HUD to investigate, to deliberate and to decide which project-based Section 8 developments – such as Evergreen Terrace, the property at the heart of this dispute – shall be preserved and which shall not; and they ignore the jurisprudence of this Court that broadly recognizes that where state and local laws interfere with federal programs – or, as here, destroy them – conflict preemption must apply. The opinion by the Seventh Circuit inappropriately grafts onto the Constitution a requirement for preemptive language that never was there, either in language or interpretation.

The Seventh Circuit also has effected a serious reworking of the Property Clause by virtue of

its crabbed construction of "property" that appears to ignore: (a) HUD's first lien mortgage and its right to possession, (b) HUD's direct right to control how the property is used and who may use it, and (c) HUD's beneficial interest in two critical contracts between it and New West and New Bluff that control the property for the next 30 years and mandate that it remain affordable housing

These radical departures – if left in place – will have an enormous impact on affordable housing throughout the country. There is an undeniable need for such housing – a need that will only intensify in years to come. If the Seventh Circuit's decision remains in place, Joliet's strategy will become a template for every community – and likely there are many – that seeks to eliminate low income affordable housing from its midst.[1] If, in fact, we are on the verge of such a sea change in the law – namely, that federal remedial programs with proper delegated authority are to be left at the mercy of local municipalities – it should come after this Court

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[1] Such dire predictions are not mere speculation. Despite the Seventh Circuit's watershed ruling on remand from this Court in *Metropolitan Development Housing Corp. v. Village of Arlington Heights*, 558 F. 2d 1283 (7th Cir. 1977), and despite the established jurisprudence of the Fair Housing Act, Joliet maintained at oral argument before the Seventh Circuit, as it had in its pleadings, that no federal law, be it Section 3617 of the Fair Housing Act, the National Housing Act, the Supremacy Clause or the Property Clause, constrained its exercise of its sovereign powers. This is the type of stance the Seventh Circuit has empowered, if not embraced.

has decided that that approach best serves the Nation and the law.[2]

This case is not *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), where federal labeling obligations and state tort liability could reasonably co-exist. Nor is it *Cuomo v. Clearing House Association, L.L.C.*, 129 S. Ct. 2710 (2009), where federal banking supervision and the state power to investigate violations of state fair lending laws were woven together. Those decisions both reflect a practical resolution to competing – but not diametrically opposed – interests.

This dispute, however, allows no possibility for accommodation or co-existence. The federal and local laws and interests are irreconcilable: HUD, following a thorough and complete review process mandated by Congress, determined that Evergreen Terrace should be preserved as affordable housing for at least the next 30 years; Joliet seeks to condemn and demolish Evergreen Terrace.

This case is thus an ideal medium through which to clarify the standards that govern conflict preemption and the deference to be extended to delegated federal power under the Supremacy Clause and the Property Clause.

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[2] This is not a political question. Congress already has spoken: it wants affordable housing preserved and it wants HUD to decide how to accomplish that. This appeal is about whether those decisions are protected by the Constitution.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background[3]

There are two federal statutes that dominate the discussion of the housing programs Congress established to ensure the preservation of federally-assisted project-based Section 8 housing such as Evergreen Terrace here. The first is the National Housing Act ("NHA"), which establishes and sets the parameters of the program and the public-private partnership that is at the core of the effort to provide such housing. The second, more recent enactment is the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), that provides for and controls refinancing and restructuring of the Nation's aging supply of project-based Section 8 housing. In both statutory schemes, Congress expressly delegated to HUD significant and controlling decision-making authority.

1. The NHA

In 1954, Congress created a federal mortgage insurance program under Section 221 of the NHA, "designed to supplement systems of mortgage insurance under other provisions of the [NHA] in order to assist in relocating families to be displaced as the result of governmental action" – *i.e.*, urban renewal projects. Housing Act of 1954, ch. 649, §123, 68 Stat. 590, 599. The program was primarily for

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[3] The statutes most pertinent to this appeal are contained in Appendices G through K. Unless otherwise noted, citations are to the current version of the U.S. Code.

single-family dwellings. In 1961, it was significantly "broadened to authorize a new program of long-term, low-interest-rate, 100-percent loans for rental and cooperative housing projects containing five or more dwelling units." S. REP. NO. 87-281, at 8 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1923, 1929. The current statement of purpose of Section 221 is "to assist private industry in providing housing for low and moderate income families and displaced families." Disaster Relief Act of 1966, Pub. L. No. 89-769, §4(a), 80 Stat. 1316, 1317 (codified at 12 U.S.C. §1715*l*(a)). It is a broad-based program designed to provide housing for low income families by and through joint public and private initiatives.

Congress made HUD the pivotal player in the effort to provide this housing. First, HUD must approve both the mortgagee and the mortgagor of any particular development. *See* 12 U.S.C. §1715*l*(d)(1), (3), (4). Generally, the note evidencing the loan and the deed of trust are approved by HUD, and HUD endorses the note as part of its mortgage insurance. HUD, in effect, selects and approves the key players. But HUD's role extends even deeper. HUD may require the mortgagor "to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation." HUD may require contracts to give effect to the restrictions it has imposed. 12 U.S.C. §1715*l*(d)(4)(iv). *See also* 12 U.S.C. §1715*l*(d)(3). Pursuant to such a contract – referred to as a "Regulatory Agreement" – the mortgagor/owner must agree to "certain 'affordability restrictions,' including restrictions on allowable rental rates, and restrictions on the rate of return the owner could

receive from the housing project." *See also* 12 U.S.C. §1715*l*(l) (rental charges). In addition, a Regulatory Agreement often incorporates by reference a Housing Assistance Payments ("HAP") contract – a written contract between the owner and HUD for the purpose of providing rent subsidies to the owner on behalf of eligible families for project-based subsidies under Section 8 of the United States Housing Act of 1937 ("USHA"), 42 U.S.C. §1437f(a)-(g). *See also* 12 U.S.C. §1715*l*(f). A Regulatory Agreement continues in effect "[a]s long as [HUD] is the insurer or holder of the mortgage." 24 C.F.R. §200.105(a). *See also* 12 U.S.C. §1713(b)(2).

The NHA requires the HUD-insured mortgage to contain terms and provisions concerning amortization of the principal, insurance, repairs, alterations, payment of taxes, default reserves, delinquency charges, foreclosure proceedings, anticipation of maturity, additional and secondary liens, and "other matters as [HUD] may in [its] discretion prescribe." *Id.*, §1715*l*(d)(5) and (6). Moreover, the property "shall comply with such standards and conditions as [HUD] may prescribe to establish the acceptability of such property for mortgage insurance and may include such commercial and community facilities as [HUD] deems adequate to serve the occupants." *Id.*, §1715*l*(f). Congress further has authorized HUD "to adopt such procedures and requirements as [it] determines are desirable to assure that the dwelling accommodations ... are available to displaced families." *Id.* HUD also has been granted substantial discretion to dispose of properties in which it has an interest. *See* 12 U.S.C. §1713(*l*). *See*

also Housing and Community Development Amendments of 1978, 12 U.S.C. §1701z-11(e).

Finally, Congress has "authorized and directed [HUD] to make such rules and regulations as may be necessary to carry out the [NHA]." *Id.*, §1715b. It is a broad grant of power that gives the agency the mandate it needs to run a complex nationwide program involving billions of dollars. HUD's regulations governing multifamily housing mortgage insurance are set forth in 24 C.F.R. parts 207 and 221.

2. MAHRA

In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. §1437f note). MAHRA permitted HUD to refinance properties directly – often as the first mortgagee – and established a process by which the federal government would respond to the growing default rate on insured mortgages and make reconstruction and preservation funds available. MAHRA established a program known as the Mark-to-Market ("M2M") program pursuant to which existing developments may seek refinancing to make improvements as part of MAHRA's preservation agenda. MAHRA and M2M delegate to HUD the power to make the evaluation decisions with regard to preserving existing subsidized housing.

In enacting MAHRA, Congress made numerous findings. First and foremost, that "there exists throughout the Nation a need for decent, safe,

and affordable housing." MAHRA, §511(a)(1). It further found that, as of October 1997, the federal government's insured multifamily housing portfolio consisted of 14,000 rental properties – providing affordable housing to approximately 2 million low-income families – with a combined unpaid mortgage balance of $38 billion, *id.*, §511(a)(2)(A) and (3), and that the Section 8 HAP contracts on the properties were due to expire, *id.*, §511(a)(6). Without changes in the way in which federal rental assistance was provided under those contracts, owners and mortgagors of many of those multifamily housing properties likely would default on their HUD-insured mortgage payments, resulting in substantial claims to the Federal Housing Administration ("FHA") insurance funds. *Id.*, §511(a)(8). MAHRA authorized HUD to restructure and refinance such mortgages in order to preserve the Nation's stock of affordable housing.

Congress also was concerned about the distressed physical condition of many of these properties. *Id.*, §511(a)(9), (10). It found that the Nation's stock of federally insured and assisted multifamily housing would be served best by reforms that reduced the cost of federal rental assistance and reduced the cost of debt-service, freeing substantial additional sums for renovation. The ability to improve a property was to be a key factor in deciding for or against preservation. *Id.*, §511(a)(11)(A).

MAHRA therefore was intended to serve a number of explicit purposes. At the top of Congress' list: "to *preserve low-income rental housing affordability and availability* while reducing the

long-term costs of [federal] project-based assistance." *Id.*, §511(b)(1) (emphasis added). MAHRA also expressly committed the government "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation through the section 8 rental housing assistance program." *Id.*, §511(b)(7).

3. Express Delegations to HUD

When HUD sold Evergreen Terrace to New West and New Bluff in the early 1980s, it acted pursuant to delegations in 12 U.S.C. §1701z-11, which then provided that:

> It is the policy of the United States that the Secretary of Housing and Urban Development shall manage or dispose of multifamily housing projects which are owned by the Secretary in a manner consistent with the National Housing Act [12 U.S.C. 1701 *et. seq*] and this section.

12 U.S.C. §1701z-11. *See also* 12 U.S.C. §1715*l*(f)-(k).

Under the NHA, HUD restricts the mortgagor's rents, sales, charges, capital structure, rate of return and methods of operations. HUD is authorized to enter into regulatory agreements effectuating those restrictions. *See* 12 U.S.C. §1715*l*(d)(3) and (4). *See also* 24 C.F.R. §200.105(a) ("As long as the [Secretary] is the insurer or holder

of the mortgage, the [Secretary] shall regulate the mortgagor by means of a regulatory agreement providing terms, conditions and standards established by the [Secretary].").

In MAHRA, Congress charged HUD with the responsibility to investigate and approve applicants who wish to avail themselves of the M2M program. *Id.*, §514. MAHRA also requires with respect to each financing that HUD and the owners execute enforceable Use Agreements providing that for 30 years the use of the property shall be restricted to affordable housing. *Id.*, §514(e)(6). The use restriction is established in HUD regulations, as well. 24 C.F.R. §401.408. MAHRA also gives HUD "additional enforcement tools to use against those who violate agreements and program requirements in order to ensure that the public interest is safeguarded and that federal multifamily housing programs serve their intended purposes." *Id.*, §514(b)(9).

The delegations to HUD also are manifest in the extensive HUD-generated property standards that pertain to multifamily affordable housing. *See* 24 C.F.R. §200.925 ("All housing constructed under HUD mortgage insurance and low-rent public housing programs shall meet or exceed HUD Minimum Property Standards..."). *See also* 24 C.F.R. §§200.925a *et seq.* ("Multifamily ... properties shall comply with the minimum standards contained in the handbook identified in §200.929(b)(2).") These standards are enforced by an inspection regime that authorizes HUD to take whatever steps are necessary to insure properties are well managed and

well kept. This system of regulation ensures that HUD properties will conform to appropriate health and safety standards. *See* 24 C.F.R. §200.855 *et seq.*

B. The Facts Of This Case

1. Evergreen Terrace: History and Demographics

Evergreen Terrace covers approximately 7½ acres and can house up to 1,000 residents. R. 18-2 at 3, ¶10.[4] Built originally as low-income housing in the 1960s, in the early 1980s it was redeveloped in two phases, Evergreen Terrace I and Evergreen Terrace II. *Id.* Evergreen Terrace I has approximately 500 residents. In excess of 90% of the heads of households are female and under 25 years of age. More than 96% of the heads of households are African-American; and two-thirds of the heads of households have an adjusted income of less than $5,000 per year. Evergreen Terrace II has approximately 200 residents. 74% of the heads of households are female; many are under 25 years of age; over 80% are African-American. Roughly 75% have a household income of less than $10,000 per year. Thus, collectively, the heads of households are overwhelmingly female, African-American and poor.

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[4] Citations to "R. __" and "JA __" are, respectively, to the record on appeal and the joint appendix submitted to the court of appeals.

2. The Original Mortgages and Regulatory Agreements

HUD, which had acquired both Evergreen Terrace properties through foreclosure on previous Section 221 loans, sold them to New West and New Bluff in 1980 and 1982, respectively. JA 265, 277. New West and New Bluff took out long-term mortgages on the properties, the proceeds of which were used to rehabilitate Evergreen Terrace. JA 265, 277, 284, 290. The mortgages were held by private lenders and were insured by HUD under the NHA, 12 U.S.C. §1715*l*. Each mortgage specified that the mortgagor "will not permit or suffer the use of any of the property for any purpose other than the use for which the same was intended at the time this Mortgage was executed." JA 283, 289.

In accordance with Section 221(d)(4) of the NHA, 12 U.S.C. §1715*l*(d)(4), New West and New Bluff also were governed by recorded Regulatory Agreements with HUD, JA 293, 303, which were explicitly incorporated into the Evergreen Terrace mortgages. Section 9 of the Regulatory Agreements required the owners to enter into HAP contracts with either HUD or a public housing agency for the purpose of obtaining federal rent subsidies under the USHA. JA 295, 305. Section 8 of the Regulatory Agreements provided that "[o]wners shall not without the prior written approval of [HUD] ... [c]onvey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer, or encumbrance of such property." JA 294, 304. Section 11 further prohibited the owners from filing for bankruptcy or "permit[ting] ... the taking [of]

possession of the mortgaged property or any part thereof under judicial process ... and fail[ing] to have such adverse actions set aside within forty-five (45) days." JA 295, 305.

3. The M2M Restructured Mortgages and Agreements

In November 2001, New West and New Bluff informed HUD of their desire to restructure the mortgages for Evergreen Terrace under MAHRA and the M2M program. HUD accordingly developed debt restructuring plans for the properties. HUD selected the Illinois Housing Development Authority ("IHDA"), a state-chartered finance authority familiar with the local housing market, to serve as its agent for the mortgage restructurings and to analyze the property's rent level, debt and expenses, and repair needs. IHDA, on HUD's behalf, also was charged with evaluating the condition of the property and recommending whether it should be preserved given community need. IHDA submitted a report to HUD finding "a critical need to preserve the Evergreen Terrace I and II properties." JA 100.

When Joliet learned the refinancing and restructuring was under way, it became actively involved in the approval process and sought to convince HUD to deny any refinancing and to block continuation of the property as affordable housing. After Joliet challenged IHDA's findings, HUD hired a second company, Heskin Signet Partners, to perform a second analysis of the physical condition of the properties, the cost-effectiveness of any necessary repairs and the need for low-income

housing. Heskin Signet, too, concluded that "there is a compelling need to preserve the housing stock represented by Evergreen Terrace I and II due to the absolute lack of alternative housing for the approximately 600 current residents [about half of whom are children] of the 356 units at these properties." JA 101. Heskin Signet confirmed IHDA's determination that Evergreen Terrace "should be preserved in part due to the nearly impossible task these families would have in finding available, decent, safe, and affordable housing." *Id.*

On the basis of the two analyses and after numerous meetings with the participants in the evaluation process (including Joliet, the owners, and Evergreen Terrace residents), HUD approved a final restructuring plan in September, 2006. HUD paid off the original mortgages that it had insured and became the new mortgagee. In November 2006, the new mortgage and the 30-year Use Agreement required by MAHRA §514(e)(6) were executed and recorded for each Evergreen Terrace property. JA 102, 114, 128, 142, 161. The Use Agreements provide that, during the 30-year term, the property "shall be used solely as rental housing with no reduction in the number of residential units unless approved in writing by HUD" and that a specified percentage of the units must be occupied by low-income residents entitled to Section 8 rental assistance. JA 144, 163.

HUD and the owners also executed new Regulatory Agreements, which preserved the agency's ability to control and monitor the improvement, maintenance, access to, and operation

of Evergreen Terrace. These agreements were incorporated into the new mortgages. They contain essentially the same provisions as the initial Regulatory Agreements: the "[o]wner shall not without the written approval of [HUD] ... [t]ransfer, assign, pledge, dispose of, encumber or allow easements on any of the mortgaged property." JA 180, 208, 193-94, 220-221. Further, any such transferee must "assume all obligations under this Agreement and under the Notes and Mortgages." JA 194, 221. Finally, substantial escrow funds for immediate repairs to, and long-term maintenance of Evergreen Terrace were established as part of the restructuring. JA 102.

C. Legal Proceedings

1. The Civil Rights Action Against Joliet

In March 2005, New West and New Bluff filed a civil rights lawsuit against Joliet alleging, among other things, that Joliet's racially-motivated opposition to Evergreen Terrace's MAHRA restructuring and interference with the residents' use and enjoyment of the property violated the Fair Housing Act. *New West v. City of Joliet, et al.*, No. 05 C 1743 (N.D. Ill.).

2. Joliet's Resolution and Ordinance

In August 2005, in response to the filing of the civil rights action and its inability to convince HUD to halt the refinance of the property, Joliet declared Evergreen Terrace "a public nuisance and a blighted

area." At the time, Joliet was receiving monthly payments from HUD under its Annual Contributions Contract on Evergreen Terrace II based on its own required certifications that the property was being maintained in a decent, safe, and sanitary condition,. *See* 24 C.F.R. §883.310(b)(6) (in order to receive Section 8 rental assistance payments, projects must comply with "[a]pplicable State and local laws, codes ordinances, and regulations"). Joliet also had in its possession reports from the Joliet Fire Department that there were no violations at the site.

In October 2005, Joliet enacted Ordinance No. 15298 authorizing an eminent domain proceeding to acquire fee simple title to Evergreen Terrace.

3. Joliet's Eminent Domain Action

On October 7, 2005, Joliet filed this condemnation action in Illinois state court. Joliet named several defendants, including the Government National Mortgage Association ("GNMA"), an agency of the United States government administered by HUD, but failed to name HUD itself. The federal government removed pursuant to 28 U.S.C. §§1442, 1444, and 1446 because the action affected a property in which the United States had an interest or lien, *see* 28 U.S.C. §2410, and was against a federal agency.

Ultimately, the District Court dismissed GNMA as a defendant, but ruled that HUD was a necessary party given its significant property interest in the site. The Court rejected Joliet's efforts to remand the case. Joliet sought mandamus

relief from the denial of its remand motion. The Seventh Circuit denied the mandamus petition.

In the District Court, New West and New Bluff and HUD raised defenses to Joliet's proposed exercise of its eminent domain power, including that the condemnation was barred by the Supremacy Clause, Property Clause and Contract Clause of the United States Constitution. On April 3, 2007, the District Court granted Joliet's Motion for Judgment on the Pleadings with respect to the Supremacy Clause. App. C. Thereafter, HUD and New West and New Bluff moved for summary judgment based on preemption. On March 27, 2008, the District Court denied Defendants' motions for summary judgment rejecting as a matter of law the federal constitutional defenses. App. B. The District Court subsequently certified its ruling for interlocutory review pursuant to 28 U.S.C. §1292(b). The Seventh Circuit accepted review.

On April 9, 2009, the Seventh Circuit affirmed the District Court's rulings. *City of Joliet v. New West, L.P.*, 562 F.3d 830 (7th Cir. 2009) (Easterbrook, C.J.); App. A. The panel found there was no "clear statement" or "federal command" in the federal housing laws that would preempt Joliet's ordinance authorizing the condemnation of Evergreen Terrace. *Joliet*, 562 F.3d at 836, 837. In its view, there was no preemption because neither the NHA nor MAHRA "has any clause preempting state law". Relying on *Wyeth v. Levine*, 129 S. Ct. at 1199-1203, the panel stated that "a preemptive regulation with the force of law" is necessary in order to establish "preemption inferred from a clash

of goals and objectives." *Joliet*, 562 F.3d at 835. According to the panel, "there is no *affirmative* declaration of preemption in any statute or rule" and therefore "no concrete conflict between condemnation and any part of [MAHRA]". *Id.*, at 836. The panel added:

> It might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished.

Id., at 838.

The panel never addressed the explicit Congressional delegation of preservation decisions to HUD under the NHA or MAHRA.

The panel also held that HUD's interest in the property as mortgagee, as regulator, and as beneficiary of Regulatory and Use Agreements did not rise to a protectable property interest under the Property Clause of the Constitution. *Id.*, at 839.

Requests for rehearing and rehearing *en banc* were filed by HUD, by New West and New Bluff, and by the residents. The Seventh Circuit denied them on July 14, 2009. App. D.

REASONS FOR GRANTING THE PETITION

As set forth below, the decision of the Court of Appeals substantially alters the terrain of preemption law – specifically the law of conflict preemption. It also appears to abandon the deference to delegated authority articulated in *U.S. v. Shimer*. And finally, it offers a view of the Property Clause that will render protection of any federal property interest other than fee simple interests extremely difficult.

The Seventh Circuit's decision is a political statement as much as a set of legal conclusions that is grounded in a commitment to limit federal power over local government. The decision raises important questions of federalism's balance – questions that play a central role in an on-going conversation in this Court.

A. THIS COURT SHOULD GRANT REVIEW TO CORRECT THE SEVENTH CIRCUIT'S REFUSAL TO ACKNOWLEDGE EXPRESS CONGRESSIONAL DELEGATIONS TO HUD

Despite extensive briefing and argument on the law of delegation and conflict preemption, the Seventh Circuit never acknowledged the fact that Congress *expressly* delegated to HUD the power to decide whether and how Evergreen Terrace should be preserved as affordable housing for the next 30 years. There is not a word on this controlling issue in the opinion.

The Congressional delegations to HUD, however, are unambiguous and explicit. They begin with the over-arching principle that:

> It is the policy of the United States that the Secretary of Housing and Urban Development shall manage or dispose of multifamily housing projects which are owned by the Secretary in a manner consistent with the National Housing Act [12 U.S.C. 1701 *et seq.*] and this section.

12 U.S.C. §1701z-11.

Further, Congress expressly authorized and mandated HUD to: (a) protect the financial interests of the federal government in such programs, (b) minimize displacement of residents, (c) preserve affordable housing units, and (d) minimize demolition. 12 U.S.C. §1701z-11(a)(2), (3). When an owner sought refinancing, Congress also made it HUD's duty to initiate a detailed investigation, retain appropriate experts, solicit opinions from affected parties (including here, Joliet) and, then, decide the issue. This is part of a nationwide statutory and regulatory process over which HUD presides.

Supreme Court precedent mandates deference to such delegated authority when the agency in question – here HUD – is "acting within the scope of its congressionally delegated authority." *New York v. FERC*, 535 U.S. 1, 18 (2002). *See also New York v. FCC*, 486 U.S. 57, 64 (1988) (an "agency may

determine that its authority is exclusive and preempt [] any state efforts to regulate in the forbidden area ... if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, *we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.*") (emphasis added); *U.S. v. Shimer*, 367 U.S. 374 (1961).

The record in this case demonstrates a series of considered decisions by HUD pursuant to its delegated authority culminating in its determination that Evergreen Terrace should be preserved as federal affordable housing for at least the next 30 years. This is a decision that "Congress would have sanctioned" since Congress expressly directed that HUD proceed as it did here. *See, e.g., Shimer*, 367 U.S. at 377-378.

This decision-making process is entitled to substantial deference, yet the Seventh Circuit simply ignored it. The Seventh Circuit's dismissive comment that HUD and New West and New Bluff and the residents were claiming preemption on the basis of "purposes" or "finding" clauses in the statutes ignores the fact that HUD had made a specific finding that Evergreen Terrace should be preserved because of the shortage of affordable housing in Joliet. It ignores, too, the citations to numerous statutory provisions and regulations that detail HUD's express powers with respect to the approval, and supervision over both lenders and project owners. *See* 12 U.S.C. §1715*l*(f)-(k). *See also*

12 U.S.C. §§1715*l*(b), (d)(3) and (4); 24 C.F.R. §200.105(a).

Similarly, the panel's statement that "[i]t might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished," *Joliet*, 562 F.3d at 838, ignores the fact that *this is precisely what MAHRA does*.

The Seventh Circuit's failure to engage the delegation issue allows a local government to usurp HUD's Congressionally-delegated role and extinguishes, in one swift blow, the Congressionally-mandated and statutorily required Use and Regulatory Agreements, HAP contracts and mortgages – all in violation of the Supremacy Clause.

It is, of course, possible that we have come to a juncture where lower courts may freely ignore – not even discuss – the principles of *U.S. v. Shimer* or *New York v. FERC* or *New York v. FCC* and the enumerated powers of Congress in the Constitution in considering agency action. But if this is our new jurisprudential reality, it should not be permitted to stand without careful review by the Court.

B. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE BOUNDARIES OF CONFLICT PREEMPTION

This Court recently issued two preemption decisions of considerable importance: *Wyeth* and *Cuomo*. Both ultimately take a pragmatic approach to the Supremacy Clause – permitting where possible co-existence between state authority and federal programs or law. In *Wyeth*, the Court permitted state court tort claims to survive, notwithstanding compliance with federal labeling requirements. In *Cuomo*, the State of New York was permitted to pursue a subpoena directed at compliance with state fair lending laws despite statutory deference to the OCC as a bank's regulatory authority.

Both cases also recognized, however, the continued vitality of "conflict preemption" – preemption where a federal program is defeated or seriously compromised by state or local law. In both cases, whether and in what form the doctrine exists was the subject of considerable and extended comment. The Seventh Circuit panel here, however, appears to be of the view that the doctrine has been improvidently embraced by this Court and that, absent clear preemptive language in statutes or regulations, should be put to rest. The panel went out of its way to note the absence of preemption language in the statute and a comparable absence of regulatory language limiting local power. Conflict preemption, in the Seventh Circuit's view at least, requires an incantation either in regulations or statutes that state or local law is subordinate.

Neither the Constitution nor this Court has ever required such formalism in the context of conflict preemption. That is the realm of express preemption. To now require, as the Seventh Circuit has, such language for conflict preemption is to extinguish the doctrine without saying so. Where local initiatives and federal programs are irreconcilable – as is clearly the case here – local initiatives must give way if the Supremacy Clause has any meaning.

Unlike *Wyeth* and *Cuomo*, here impossibility must be presumed. Joliet seeks the destruction of federally assisted, federally mandated and federally controlled affordable housing and the ouster of HUD from the neighborhood.

Wyeth and *Cuomo* consider but ultimately leave open the question of conflict preemption in a non-accommodationist world. It is difficult to imagine a case more suited to a clear and focused discussion of conflict preemption than this one. Only this Court can provide guidance on the nature of conflict preemption and whether it continues to exist in recognizable constitutional form.

C. THIS COURT SHOULD GRANT REVIEW BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF THIS CASE TO THE CONCEPT OF FEDERAL PROPERTY AND THE PARAMETERS OF THE PROPERTY CLAUSE

Under the Property Clause of the Constitution, federal property "cannot be seized by

authority of another sovereign" over the objection of the federal government. *Armstrong v. United States*, 364 U.S. 40, 43 (1960); *Alabama v. Texas*, 347 U.S. 272, 273 (1954) ("The power to dispose of any kind of property belonging to the United States is vested in Congress without limitation.")

This Court has construed the term "property" to include "all other personal and real property rightfully belonging to the United States." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 331 (1936). Mortgages – notwithstanding the suggestion to the contrary in the Seventh Circuit's opinion – are property interests. *Armstrong v. U.S.*, 363 U.S. at 48; *City of New Brunswick v. United States*, 276 U.S. 547, 555 (1928); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601 (1935). *See also U.S. v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992).

So, too, are contract rights to control or dispose of real estate. HUD's powers to control or direct the disposition of Evergreen Terrace are set forth at length in the Use and Regulatory Agreements authorized by 12 U.S.C. §1701z-11, MAHRA §514(e)(6) and 24 C.F.R. §§100.105(a) and 401.408. These are substantial; they are enforceable; they run with the land as recorded instruments as MAHRA requires.[5]

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[5] Under the agreements: (a) HUD and the owner agree to the use of the property, including who shall occupy the property, what affordability requirements control and how the property shall be used; (b) the owner promises to maintain the premises in a particular condition and agrees to a range of remedies for default; (c) before an owner may convey, transfer, (cont'd below)

The right to control access and the ability to exclude other uses and owners was expressly bargained for by the government in the disposition of Evergreen Terrace. "The right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). *See also Lingle v. Chevron*, 544 U.S. 528, 539 (2005) ("perhaps the most fundamental of all property interests"); *Hodel v. Irving*, 481 US 704, 716 (1987) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("one of the most essential sticks in the bundle of rights that are commonly characterized as property")).

The Seventh Circuit panel took an exceptionally narrow view: that HUD's property interests must be fee simple interests before the Property Clause may be invoked. There is no law that recognizes this limited view of what constitutes property and none was cited by the Seventh Circuit. Again, the panel diminished federal interests, this time by applying restrictive rules that would never obtain in a private setting. The Seventh Circuit's own precedent makes that clear.

(cont'd from above) encumber or sell the property, HUD has the right to review, approve, or prevent such transaction; (d) HUD approval is required for the owner to remodel, add to or reconstruct the property; (e) HUD may direct and control the terms of any management contract entered into by the owners; and (f) absent HUD approval, the owner shall not permit the encumbrance of or taking possession of the property under any judicial process. JA 144-45, 163-61, 293-95, 303-05.

It is important that this Court clarify the reach of the Property Clause and the parameters of what "property" means in this dispute. If all federal property other than fee simple interests is subject to seizure by state or local governments, then the Seventh Circuit has effected a profound reworking of the concept of property. And if this new concept applies only to the federal government but no one else, it is untenable as a matter of law. For this Court to permit such a reworking by default is a mistake.

D. PROTECTING NATIONAL MORTGAGE MARKETS AND HUD INSURANCE WARRANTS REVIEW BY THIS COURT

The NHA seeks to use the creative energies and power of private enterprise to meet the important goal of protecting and preserving affordable housing. As set forth in the NHA:

> This section is designed to assist private industry in providing housing for low and moderate income families and displaced families...

12 U.S.C. §1715*l*(a).

The Seventh Circuit's decision also does serious damage to this important federal program because it unravels the public-private partnerships that characterize the NHA and MAHRA.

Low income rental housing developments are essentially uneconomic under conventional valuation and mortgage underwriting standards, *i.e.*, the construction and operating costs of such developments cannot be supported by the rental income stream from the low-income residents. Because conventional mortgage financing is often unavailable for such projects, the federal government has implemented various types of federal support including HUD mortgage insurance under the NHA. Mortgage insurance facilitates the flow of mortgage capital into the affordable housing industry by insuring lenders against mortgage risks that would otherwise be unacceptable under conventional underwriting standards. HUD mortgage insurance enables a lender to make a loan for affordable housing with the assurance that, in the event of default, the lender will be able to collect mortgage insurance benefits from HUD, thereby protecting the lender from loss on a loan that it would not have funded under conventional loan underwriting standards.

HUD-insured mortgages for affordable housing are also part of a significant secondary market that has the goal of increasing liquidity in mortgage investments, enhancing the availability of mortgage credit, and improving the distribution of investment capital. Congress has facilitated the development of this market:

> The Congress declares that the purposes of this subchapter are to establish secondary market facilities...[and] to provide that the

> operations thereof shall be financed by private capital to the maximum extent feasible...

12 U.S.C. §1716.

The Seventh Circuit's embrace of Joliet's eminent domain proceeding is a serious threat to the flow of mortgage capital into the affordable housing industry.

First, it introduces significant uncertainties into the market, as it cedes control over this federal program to local interests. This is a risk that will need to be fully disclosed in the secondary market. Giving local entities the power to disrupt the income stream associated with affordable housing makes valuing these assets very difficult and discourages active private participation in the program. Over time, this uncertainty will do serious damage.

Second, it erodes the viability of HUD insurance. The lender's mortgage insurance contract with HUD requires the lender to assure HUD that title to the property is free and clear of unpermitted encumbrances as a condition of collecting mortgage insurance benefits on a defaulted loan. However, when a local governmental authority files a condemnation action, it typically also files a notice of *lis pendens* against the property, as Joliet did in the case of Evergreen Terrace. This notice of *lis pendens* constitutes an encumbrance on title that is not permitted under the HUD mortgage insurance contract. The lender is not able to cure this title defect in the same way as it could cure other types of

unpermitted encumbrances, such as a mechanic's lien, by simply paying it off and receiving a release. Rather, the notice of *lis pendens* will continue until final resolution of the condemnation proceeding. If the condemning authority prevails in the condemnation action, the lender would never be able to satisfy HUD's clear title requirements, and the effect would be the complete loss of all of the lender's protections under the HUD insurance. It would be as if the HUD insurance contract had never existed. As such, lenders would then need to make their underwriting decisions for affordable housing project loans on the assumption that the HUD insurance would not be available if a local government files a condemnation action against the affordable housing. This would create a significantly greater risk for lenders and could significantly disrupt the flow of mortgage capital, in both the primary and secondary markets, to the affordable housing industry.

To allow Joliet to seize control of and destroy a property like Evergreen Terrace and its income stream is to dismantle the capital incentives that keep the NHA's private-public partnership in place. It is another measure of the unfortunate effect of the Seventh Circuit's position.

CONCLUSION

For the reasons stated above, New West and New Bluff respectfully urge this Court to grant this Petition and set the case for briefing and argument.

Respectfully submitted,

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